

(2) Supreme Court

FILED

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No. 88-100

In the Supreme Court of the United States

OCTOBER TERM, 1988

CHRIS POLYCHRON, PETITIONER

v.

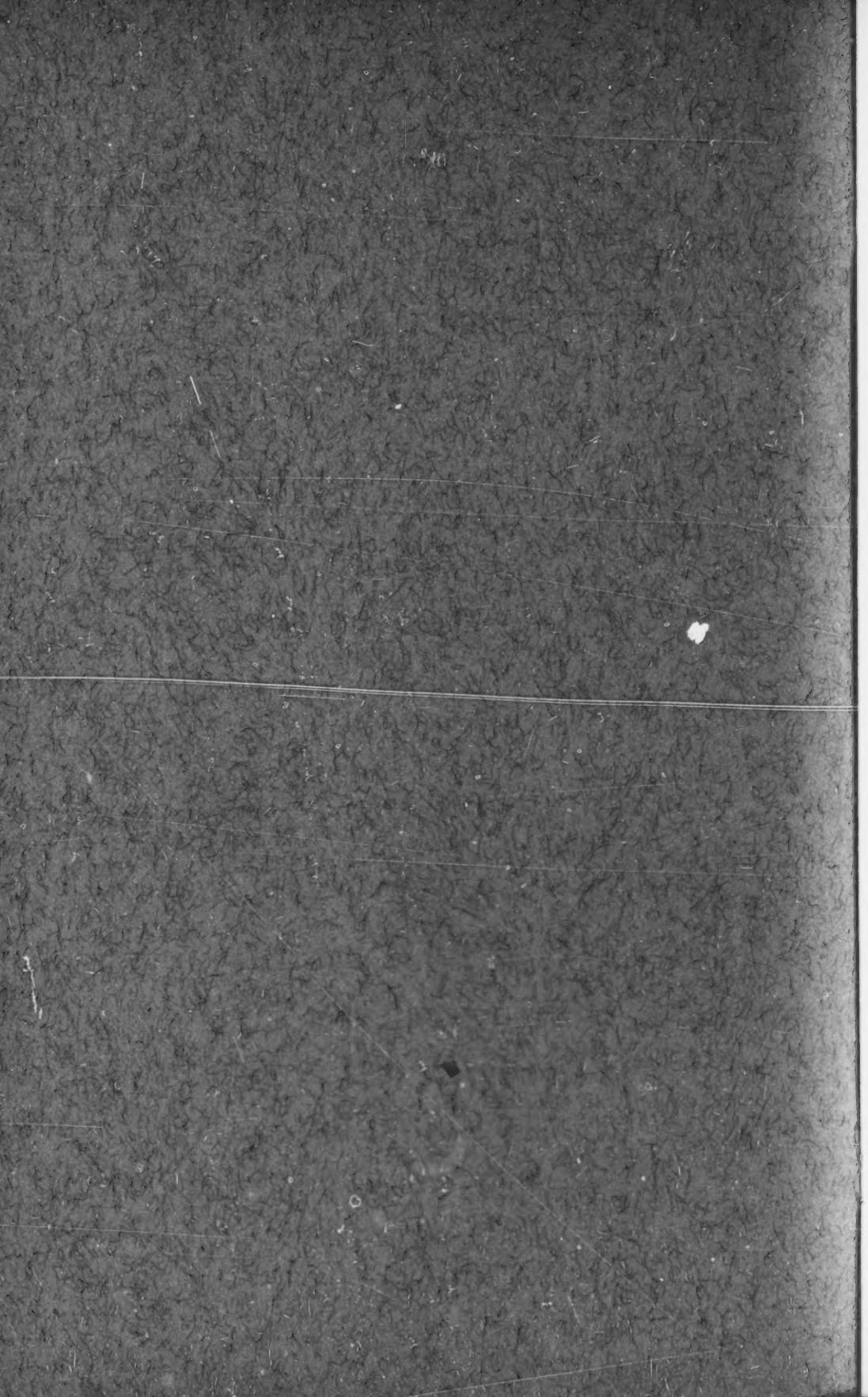
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in reversing an order dismissing an indictment for failure to state a federal offense.

Petitioner, the president of a bank, was indicted by a grand jury sitting in the Western District of Arkansas. The indictment charged him with two counts of failing to file currency transaction reports (CTR), in violation of 31 U.S.C. 5313 and 5322; two counts of concealing material facts from the Department of the Treasury in regard to those transactions, in violation of 18 U.S.C. 1001; and one count of conspiring to violate the currency transaction reporting statute and regulations, in violation of 18 U.S.C. 371 (Pet. App. D1-D8).

On February 19, 1987, the district court dismissed the indictment. The court noted that by statute and regulation financial institutions are required to report currency transactions that exceed \$10,000 in amount. The court con-

cluded that those provisions did not require the aggregation of transactions occurring in the same bank on the same day. The court also concluded that the instruction in the Currency Reporting Form (Form 4789) stating that multiple transactions by any person in any one day should be treated as a single transaction could not serve as the basis for criminal liability. Accordingly, the court held that the indictment did not charge an offense when it alleged that petitioner had failed to report his bank withdrawals on March 9 and March 11, 1982, where each individual withdrawal was under \$10,000, but where the withdrawals in the aggregate amounted to more than \$10,000 for each of those two days (Pet. App. A1-A9).

The court of appeals reversed. The court ruled that the statute sufficiently apprised petitioner that when a financial institution or its officer or employee acting within the scope of his employment breaks an otherwise reportable transaction into multiple transactions in a single day, each of which does not exceed \$10,000, the bank or its officer or employee may be held criminally responsible for failing to file a CTR or causing the bank to fail to file a CTR (Pet. App. B1-B9).

Petitioner contends (Pet. 21-30) that individual currency transactions of less than \$10,000 may not be aggregated to support an indictment, even when the transactions occur on the same day at the same bank. He also contends (Pet. 26-30) that the court of appeals improperly relied on the instructions on the Currency Reporting Form to support the indictment. Finally, petitioner contends (Pet. 30-32) that the decision of the court of appeals was contrary to the Ex Post Facto and Due Process Clauses of the Constitution.

Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of

appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to raise his present contentions before this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.\*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED  
*Solicitor General*

AUGUST 1988

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\* Because this case is in an interlocutory posture, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.